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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 141

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

[With Supplemental Appendix in Separate Volume]

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No.

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THE PEOPLE OF THE STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on April 18, 1968, hereinafter described.

Opinions Below

Preliminary Explanation: This petition for certiorari arises upon an order or judgment of the Court below which was rendered after reargument had been granted by that Court. Recitals are therefore needed herein concerning "Opinions Below" which preceded the latter decision on reargument.

* * * * *

The Court of Appeals of the State of New York did not write an opinion either upon granting the motion (by the within petitioner) for reargument, or in rendering its

decision of April 18, 1968, after reargument in which that Court adjudged that its original decision of July 7, 1966 be adhered to. There is not yet any official report of the decision (without opinion) of April 18, 1968; a copy of that decision is printed in Appendix A hereto *infra*; that decision contains a short dissenting memorandum by Honorable Chief Judge Stanley H. Fuld. That Court also did not write an opinion in rendering its original decision of July 8, 1966 (which has now been adhered to by that Court after reargument); two Judges of that Court (the then Chief Judge Desmond and the then Associate Judge Fuld) dissented from the decision of July 8, 1966 in an opinion which is printed in Appendix B hereto, *infra*, as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A.D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra*. The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra*.

Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed is dated April 18, 1968 (Appendix A hereto *infra*; the remittitur on said judgment or order consists of a typewritten entry supplementing a prior remittitur on the original decision of the Court of Appeals dated July 7, 1966, and this remittitur item with the supplemental typewritten entry is printed in Appendix AA hereto, *infra*). The aforesaid judgment or order of April 18, 1968 adjudged that the original decision

of the Court of Appeals rendered July 7, 1966 in this case be adhered to after the granting of a motion by the within petitioner for reargument, and after such reargument had been held on full briefs and oral argument on the merits.

The aforesaid judgment or order of the same Court dated July 7, 1966 which was adhered to by the aforesaid judgment or order of April 18, 1968, after reargument, had affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the witihn petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justic Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Thus, the judgment or order now sought to be reviewed—being, again, the decision of April 18, 1968 after full reargument in the Court below—brings before this Court on a *de novo* basis for the purposes of certiorari jurisdiction, the issues of this case relating to the wiretapping and the physical search. This *de novo* certiorari-jurisdictional posture of the case needs to be noted for the particular reason

that this case was previously before this Court on a petition for certiorari (October Term, 1966, No. 614, *Cohen* v. *New York*, cert. denied 385 U.S. 976, "for want of a final judgment", reh. denied 385 U.S. 1032) which sought review of the original final decision of the Court below dated July 7, 1966, the latter decision being the one which has now been adhered to by the Court below in its decision of April 18, 1968 here sought to be reviewed.

In view of the fact that the denial of our aforesaid October Term 1966 petition for certiorari (No. 614, 385 U.S. 976) was "for want of a final judgment", we realize that it is necessary for us to address ourselves in this statement of "Jurisdiction" in this new petition for certiorari, to the problem of "finality", since, again, the record posture on which we are now back before this Court is that of an effort by a certiorari petitioner to obtain *de novo* certiorari consideration in a case in which certiorari has previously been denied and in which the occasion for renewal of the certiorari application is that there has intervened a full reargument procedure on the merits in the Court below resulting in an adherence by the Court below to its original position (as to which certiorari had previously been denied).

In thus addressing ourselves to this certiorari-jurisdiction question of finality of the decision sought to be reviewed, we would respectfully commence by quoting the following portion of our statement of "Jurisdiction" appearing at pp. 2-4 of our previous petition for certiorari (No. 614, October Term 1966, *supra*)*:

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* The previous petition for certiorari above mentioned is printed as Appendix SA in the separately bound Supplemental Appendix filed herewith. That Appendix SA as contained in our within Supplemental Appendix omits certain appendices which were originally included in it as filed at the October 1966 Term (appendices A, B, C, D, and J), because these same items now need to be printed in the Appendices to the present petition, *infra*.

"Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecution involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

> It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jurisdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution."

The item just quoted from our 1966 Term petition for certiorari is now hereby adopted by petitioner and made part of our within presentation on his behalf on the question of satisfying the requisites of "finality" for purposes of certiorari jurisdiction.

In addition we submit, on this question of "finality", the following:—

As more fully recited *infra* (in our "Statement Of The Case"), our motion for reargument in the Court below which resulted in the granting of reargument and then in the rendering of the decision of April 18, 1968 here sought to be reviewed, was on the ground that *Berger* v. *New York*,

388 U.S. 41, decided subsequent to the original decision of the Court below on July 7, 1966, had the necessary effect of voiding *ex parte* Court orders authorizing telephone wire-tapping under *N.Y. Code Crim. Proc.* §813-a, including the wiretap order at issue in this case. (The latter motion for reargument in the Court below is in the certified record filed herewith, and it is printed as Appendix SB in the Supplemental Appendix filed herewith.) The latter motion for reargument had been filed in September 1967. While that motion for reargument was pending in the Court below, this Court, on December 8, 1967, decided *Katz* v. *United States*, October Term 1967, No. 35. Then, on December 29, 1967 the Court below granted our motion for reargument. Thereupon, in our brief on the merits in the Court below on the reargument we urged that the *Katz* decision had strongly fortified our contention (which we had previously based, in our motion for reargument below as aforesaid, solely on this Court's decision in *Berger*) that State telephone wiretapping is subject to the Fourth Amendment. (A copy of "Appellant's Brief On Reargument" in the Court below is printed as Appendix SC in the Supplemental Appendix filed herewith.) Also, in that brief of ours on the merits on the reargument in the Court below we argued that the rulings of this Court in both *Katz* and *Berger* are retroactively applicable to our case. However, as stated, the Court below on April 18, 1968 rendered a decision, without opinion, stating that "upon reargument [it] did * * * adjudge that the original decision of July 7, 1966, be adhered to" (Appendix AA hereto, *infra*).

To the extent that the decision of the Court below here sought to be reviewed (the decision of April 18, 1968 on reargument) represents or may represent a ruling that

Katz and *Berger* are not retroactive—which is the likely meaning of the decision below in view of the same Court's decision in *People* v. *Kaiser,* 21 N.Y. 2d 86, certiorari granted April 22, 1968, No. 1451 Misc.—the decision of the Court below herein creates a situation of altogether possible future severe injustice to the present petitioner, in a manner which may be pertinent to the question of this Court's jurisdiction of the present petition for certiorari. This case, which has not yet been brought to trial on the indictments but has gone through plenary state proceedings on petitioner's motions for suppression of wiretap evidence and physical-search evidence, would quite predictably be dismissed by the State Courts (indeed would be abandoned by the prosecution as noted *supra*) if the wiretap evidence is held inadmissible; particularly, that result would come about if the *Berger-Katz* rulings are eventually held applicable to state telephone wiretapping on a retroactive basis for cases pending in direct prosecutive proceedings or direct review proceedings. In two cases now pending in this Court, and perhaps in a third one, these issues are likely to be settled in the relatively near future. *Lee* v. *Florida,* No. 174, October Term 1967, argued on the merits in this Court on May 2, 1968, involves state telephone wiretapping or interception (See 3 *Criminal Law Reporter* 4055). *Kaiser* v. *New York,* No. 1451 Misc., October Term 1967, certiorari granted April 22, 1968 as above noted, involves the same New York State telephone wiretapping legislation which is involved in the instant case, plus the issue of retroactivity of *Berger-Katz* as above mentioned. *Desist* v. *United States,* No. 909, October Term 1967, certiorari granted March 4, 1968, involves the question of retroactivity of *Katz* as applied to the nontrespassory type of electronic room-

bugging. The series of decisions in this Court on the question of retroactivity *versus* prospectivity, from *Linkletter* v. *Walker*, 381 U.S. 618 to *Stovall* v. *Denno*, 388 U.S. 293,* appear to have given favor to retroactivity only on a closely selective case-by-case basis in which it has moreover appeared to be all but *de rigueur* that a case which is given the retroactive benefit of an overruling decision shall be a case which was pending on direct review at the time of the overruling decision.** Accordingly, it is important for the present petitioner Cohen to attempt to place his case in the status of being a case which, if possible, shall be pending on direct review in this Court at the time when the Court may render its decisions on the merits in the *Kaiser* or *Lee* cases, or in the *Desist* case.

We hasten to say that we are not overlooking for one moment that this Court has already once declined to find finality in the present case (385 U.S. 976). Our thought is that the Court may now be disposed to reconsider its previous view of "want of a final judgment" in this case, either on the basis of the presentation on this issue in our previous petition for certiorari as quoted at pp. 5-6, *supra*, or on the basis of the additional considerations of justice here being suggested in relation to the retroactivity problem. Those considerations of justice include factors in addition to the ones above mentioned. This case of petitioner Cohen has witnessed since 1962 the most diligent kind of continuous pressing by defense counsel of the issue of wiretap un-

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* See also *Tehan* v. *Shott*, 382 U.S. 406 and *Johnson* v. *New Jersey*, 384 U.S. 719.

** See the extensive discussion of these recent retroactivity-prospectivity decisions in the joint brief for petitioners (on the merits), pp. 52-89, in *Desist* v. *United States*, No. 909, October Term 1967. We adopt that discussion here as being virtually in all respects pertinent to the retroactivity questions in our case.

constitutionality. Indeed this case was the vehicle through which it was first established in New York State that there is a right to move pre-trial for suppression of wiretap evidence (Appendix D hereto, *infra*). It would be a peculiarly painful injustice, should State telephone wiretapping at last be definitely outlawed by this Court in the relatively near future, for the present petitioner Dr. Cohen to be deprived of the benefit of such a decision through some vagary of litigational chronology which might be avoidable by a favorable reconsideration at this juncture of the problem of the certiorari jurisdiction.* Should this Court be disposed to reconsider that problem in this case, we would further respectfully suggest that the Court's powers under the "All Writs" Act (28 U.S.C. §1651) may be found applicable for the assertion, or for an interim preservation, of the Court's jurisdiction to review this case.

In concluding this statement as to jurisdiction, we add the following formal particulars:—

The jurisdiction of this Court is invoked on all of the grounds above set forth, and under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a))

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* Cf. *Stovall* v. *Denno*, 388 U.S. 293, 301, where the Court mentioned that one important factor in favor of allowing retroactivity of an overruling decision is "the possible effect upon incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators).

on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.

Questions Presented

1. Does either *Berger* v. *New York*, 388 U.S. 41, or *Katz* v. *United States*, U. S. , 19 L. Ed. 2d 576, No. 35, October Term 1967, or do both of those decisions, make State telephone wiretapping in State criminal prosecutions subject to the Fourth Amendment? And, if so, must the wiretap evidence in this case be suppressed?

2. Is the answering of Question 1, above, affected by considerations of retroactivity *versus* prospectivity? Should not *Berger*, or *Katz*, or both, be held applicable to this case either on a principle of retroactivity, or on the ground that this case has not yet been brought to trial on the indictments, the proceedings herein thus far having occurred in connection with pretrial motions to suppress evidence? (Not argued in this petition; the argument in the Joint Brief for Petitioner, pp. 52-89, in *Desist* v. *United States*, No. 909, this Term, cert. granted March 4, 1968, is adopted herein.)

3. In view of the circumstances set forth in our statement as to "Jurisdiction", *supra*, is not this Court's certiorari jurisdiction available, or is not alternatively or also its jurisdiction and power under the "All Writs" Act (28 U.S.C. §1651) available, to afford to the present petitioner *via* this petition for certiorari constitutional relief with respect to the wiretap evidence?

4. Supplementing Question 1, above, is the wiretap evidence herein involved unconstitutional under the *Berger*

decision (*supra*) standing alone as having invalidated New York State's permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) as unconstitutional on its face; or does the *Katz* decision (*supra*) effect a gloss on *Berger* so as to call for disposition of this case on a particular and selective application of Fourth Amendment tests, rather than on the *Berger* basis of statutory unconstitutionality on its face?

5. Supplementing all of the above questions which are cast in terms of the Fourth Amendment, is the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a), or is the wiretap evidence in this case, unconstitutional under the Supremacy Clause of Article VI of the United States Constitution by reason of conflict with 47 U.S.C. §605?

6. Supplementing Question 5 above, can any State statutorily permitted telephone wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

7. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which

conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

8. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretap upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

9. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and

favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination), and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: N.Y. Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix E hereto, *infra*.

Statement of the Case and of How the Federal Questions Are Presented

Petitioner, a licensed physician of the State of New York, was indicted in 1960 for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

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* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which were filed in this Court in No. 614, Oct. Term 1966.

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient, but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals

affirmed (July 7, 1966) the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 NY 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act and, accordingly, vote to reverse and to order a new trial."

After the above mentioned affirmance by the Court of Appeals (with dissenting opinion by Judge Fuld, concurred in by Chief Judge Desmond) (July 7, 1966) the present petitioner was denied certiorari for review of that judgment, "for want of a final judgment" (385 U.S. 976).

Thereafter, this Court meanwhile having decided *Berger* v. *New York,* 388 U.S. 41, the present petitioner moved for reargument in the Court below as recited in our statement as to "Jurisdiction", *supra*—on the ground that *Berger* had the necessary effect of voiding *ex parte* court orders authorizing telephone wiretapping under *N.Y. Code Crim. Proc.* §813-a, including the wiretap order at issue in the present case; a copy of that motion for reargument is printed as Appendix SB in our Supplemental Appendix filed herewith.

The Court below granted the motion for reargument on December 29, 1967, this Court meanwhile having decided *Katz* v. *United States, supra,* on December 18, 1967.

After full briefing on the merits, and oral argument, the Court below decided the reargument in this case, on April

18, 1968, without opinion, stating, "Ordered and adjudged, upon reargument, that the original decision of this Court dated July 7, 1966 be and the same hereby is adhered to" (Appendix A hereto, *infra*). Chief Judge Stanley H. Fuld of the Court below dissented and voted to reverse in the following memorandum (*ibid*):

> "Until the United States Supreme Court has definitively passed on the question here presented, I adhere to the views which I expressed in my dissenting memorandum on the appeal proper herein (18 NY2d 650) and in my dissenting opinion in People v. Kaiser (21 NY2d 86, 104)." *

The printed "Appellant's Brief On Reargument" in the Court below is reproduced as Appendix SC in our Supplemental Appendix filed herewith; this item is set forth in our Supplemental Appendix in order that the Court may be informed of how the Federal questions herein are presented on the basis of our presentation in the reargument in the Court below.

Throughout the proceedings below the Federal questions were duly preserved by petitioner; as seen from our recitals, *supra*, those questions were necessarily passed upon or decided in each of the three State Courts below. See also Appendix SA in our Supplemental Appendix filed herewith; that Appendix SA is our petition for certiorari in No. 614, Oct. Term 1966, wherein the appendices include a showing of the preservation of the federal questions (Appendices, E, F, G, H and I in Appendix SA contained in the Supplemental Appendix filed herewith).

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* The dissenting memorandum "on the appeal proper herein" referred to in the above quotation appears in Appendix B hereto, *infra*. Chief Judge Fuld's dissenting opinion in *People* v. *Kaiser*, referred to in the above quotation, is before this Court in the certiorari papers in the *Kaiser* case, cert. granted April 22, 1968, No. 1451 Misc., October Term 1967.

Reasons for Granting the Writ

I

[Questions Presented No.'s 1, 2, 3, 4, 5, 6]

The dissenting opinion in this case written by the then Judge Fuld of the Court of Appeals on the original argument, concurred in by the then Chief Judge Desmond (Appendix B hereto, *infra*), favored a disposition on the basis of outright constitutional invalidation of all State telephone wiretapping in obedience to § 605 of the Federal Communications Act (47 U.S.C.). By the time the reargument stage in this case had been reached in the Court below —the present certiorari application being addressed to the decision of the Court below on that reargument—the decisions of this Court had apparently expanded the framework of the issue of Federal validity of State telephone wiretapping beyond the area of the Federal Communications Act and into the area of the Fourth Amendment. We refer to the *Berger* and *Katz* decisions; and to save space in the pages proper of this petition, we respectfully refer the Court to our Appendices SB and SC contained in our Supplemental Appendix filed herewith, being, respectively, our motion for reargument and our brief on reargument in the Court below, in which latter papers we argued in detail the applicability of *Berger* and *Katz* to State telephone wiretapping.

The dissenting memorandum of Chief Judge Fuld in the decision below on the reargument practically in so many words invites a ruling by this Court "definitively" passing on "the question here presented" (Appendix A hereto, *infra*).

Debate over just what this Court's present stand is as to the constitutionality of State telephone wiretapping in the light of *Berger* and *Katz* may be expected to be settled soon —when the Court decides *Lee* v. *Florida,* No. 174 this Term, and *Kaiser* v. *New York,* certiorari granted April 22, 1968, No. 1451 Misc. this Term. If certiorari is granted in our case on the present petition, we may perhaps expectedly be scheduled by the Court for argument together with *Kaiser* at the next Term.

That State telephone wiretapping should be held subject to the Fourth Amendment and to 47 U.S.C. §605 is a proposition to which the present petitioner hopes, of course, that this Court would soon be giving explicit voice at last by way of outright holding. In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan,* 11 N.Y. 2d 350 and *Benanti* v. *United States,* 355 U.S. 96 we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause). We would add only that, again, both the *Berger* and *Katz* decisions, and the granting of certiorari in *Lee* and *Kaiser,* at the very least point strongly to the conclusion that this Court has already (in *Berger* and *Katz*) sounded the constitutional condemnation of State telephone wiretapping when done in violation of the Fourth Amendment. And to one who reads the description in *3 Criminal Law Reporter* 4055-4058 of the oral argument in this Court on May 2, 1968 in *Lee* v. *Florida, supra,* the fact which emerges with perhaps greatest interest is that both the parties and the Justices seemed to

take it for granted that *Katz* had already outlawed State telephone wiretapping at least as a general constitutional proposition, unless such wiretapping complies with the Fourth Amendment.

II

[Question Presented No. 7]

All three of the Courts below were evidently in agreement that the physical search at Dr. Cohen's home and office on the night of September 2-3, 1960, violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, in the hearing on the motion to suppress, were so complete (R. 63-556) as to afford little if any

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* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effective preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

III

[Question Presented No. 8]

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Appeals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap order, application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 565-568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described,

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* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

infra) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability' ".

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus:-

(1) As above noted the application for the ex parte order consisted of an affidavit by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. The application was made on July 28, 1960, the order was granted the same day, and

the wiretapping was done from July 29 to September 2, 1960 on Dr. Cohen's office telephone, *a period of 36 days.* (R. 21-29, 563).

(2) The McCabe affidavit (R. 23-25) contained all of the allegedly material information, the affidavits of the informers Rosen and Saltzman having been merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Audrey Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made upon *information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those *"annexed affidavits, the records and files of his office and information supplied to deponent by the detective's squad attached to the office of the District Attorney, Kings County"* (Emphasis added).

(3) The terms of the ex parte wiretap *order* itself (R. 21), as distinct from the application or affidavits, authorized tapping "of any and all telephone communications made to and from" Dr. Cohen's office telephone. Thus, the order did not specify or discriminate in any way as to which conversations might be "seized", but allowed a blanket "seizure" of any and all conversations on the telephone in Dr. Cohen's office. Nor, did the order refer to any specific alleged abortion as to which seizure of telephone conversation should be authorized and confined; there is not the slightest intimation in the order or the affidavit that any conversation at all would take place concerning past or presently being committed abortions. Nor, since (*infra*)

there had been no verbal testimony supplementing the application, can the order be construed as having constructively incorporated any limitation or specification derivable from any such verbal testimony.

(4) The scope and manner of *execution* of the actual carrying out of the wiretapping was a continuous performance from July 29 to September 2, 1960. The wiretapping was not only continuous, it was indiscriminate, saturational, literally total, in its dragnet "search and seizure" of incoming and outgoing telephone calls on petitioner's office telephone for a period of about five weeks. Some idea of the indiscriminate and total nature of this eavesdropping may be had from the District Attorney's statements, while resisting our demand for the production of the taped conversations, that the tapes had "relation to matters completely unrelated to this case" (R. 69), "this investigation went well and beyond just the eight women who are named in these indictments • • • certain information was obtained relevant to other persons but they are persons whose cases will not be before the Court" (R. 75), "the tremendous volume of telephone conversations that took place just over the wire from the doctor's office phone would require approximately six months to transcribe" (R. 77), "there are about forty records. Each one would take two hours to hear" (R. 77). And this prodigious, indiscriminate wiretapping took place, it will be remembered, on a telephone which carried, for the five weeks involved, innumerable confidential professional conversations between a physician and hundreds of his female patients, only a minute fraction of whom are alleged to have been the subject of "crime"—and those few only after the dragnet had operated for five weeks. In the light of decisions like

Osborn and *Katz* (see further discussion of those cases *infra*) which so meticulously point to utmost selectivity and discreet limitation as necessary to justify electronic "search and seizure" of conversation, the wiretapping in the present case is practically a laboratory example of what this Court inferentially condemned in those cases by enunciating the standards of constitutional acceptability illustrated by the facts of those cases.

(5) The affidavits were the only showing made before the Judge in applying for the wiretap order. No supplemental or confirmatory verbal proof was submitted to the issuing Judge. At least, if there was any such, there was no record made thereof.

(6) The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958 (two years before the wiretap order was sought) being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 (6 months before the wiretap order was sought) Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr.

Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him they left his office and Dr. Cohen did not perform an abortion because thereafter, they claim, Audrey's menstrual cycle came about naturally and they had no reason to return. No affidavit was obtained from Irma or Milton Wertheimer, or from Constantine Triges, and the affidavits do not contain one word that the Wertheimer information was verified by anyone.*

(7) The affidavits contain nothing concerning the reliability of Rosen and Saltzman as informers and the Judge who signed the wiretap order had no information from which he could determine their reliability.**

(8) The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. As for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion. The police testimony in the suppression hearing before Mr. Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman,

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* As a matter of fact, there is no indictment charge against the Doctor based on the alleged Wertheimer abortions, nor, surprisingly, the alleged Saltzman incident.

** *Draper* v. *United States*, 358 U.S. 307; *Jones* v. *United States*, 362 U.S. 257; *Henry* v. *United States*, 361 U.S. 98; *United States* v. *Ramirez*, 279 F. 2d 712, 715 (C.A. 2, 1960).

so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247). Indeed, since Mr. McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one *of at least quadruple* hearsay.

(9) Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application. Nevertheless, Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone.*

(10) Nowhere in the application for the wiretap order was there any claim of exigency or of emergency need to tap Dr. Cohen's office telephone.

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* It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A.5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8, 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

(11) Nor did the application define or discriminate or specify in any way what were the particular conversations to be eavesdropped (or "seized").

(12) Nor did the application contain anything whatever to support the contention either that evidence of any alleged past-committed abortion would be found, or that evidence of any current or "present" crime of abortion would be found—all of the allegations having related, as seen, to stale, long past alleged happenings.

We shall not here burden the Court with a recapitulation of the standards laid down in *Berger* concerning judicial warrants for electronic searches, because this Court restated the subject in its decision in *Katz*. We shall, however, quote the further elucidation of standards given in *Katz*—after which we shall describe also the Court's similar exposition in the *Osborn* case.

The following is quoted from *Katz* v. *United States* (19 L. Ed. 2d 576 at 583-584):

> "The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used

the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained the validity of such an authorization, holding that, under sufficiently 'precise and discriminate circumstances,' a federal court may empower government agents to employ a concealed electronic device 'for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a 'detailed factual affidavit alleging the commission of a specific criminal offense.' *Osborn* v. *United States,* 385 U.S. 323, 329-330. Discussing that holding, the Court in *Berger* v. *New York,* 338 U. S. 41, said that 'the order authorizing the use of the electronic device' in *Osborn* 'afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence.' Through those protections, 'no greater invasion of privacy was permitted than was necessary under the circumstances.' *Id.,* at 57. Here, too, a similar judicial order could have accommodated 'the legitimate needs of law enforcement' by authorizing the carefully limited use of electronic surveillance.

* * * * *

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth Amendment violations only in the discretion of the police."

We note next the standards laid down in the *Osborn* case (*Osborn* v. *United States,* 385 U.S. 323). It will be recalled that in *Osborn* the Court dealt for the first time with an electronic auditing activity where prior judicial permission had been obtained.

For purposes of comparison (and distinction) with our case, the operative facts in *Osborn* were as follows:— On November 7, 1963 a man named Robert Vick had a conversation with Mr. Osborn in the latter's office, Osborn being an attorney for James R. Hoffa in a then pending criminal trial in the Federal Court in Nashville, Tennessee. In this conversation of November 7, 1963, which the parties continued in an adjacent alley outside Osborn's office, Vick and Osborn discussed bribing a prospective juror in the Hoffa trial. Immediately after this November 7 meeting with Osborn, Vick, who unbeknownst to Osborn had been operating as a Federal informer, reported the conversation to an agent of the United States Department of Justice. Vick was then requested to put his report in the form of a written statement under oath, which he did. The next day, November 8, this sworn statement of Vick was shown by Government attorneys to the two Judges of the Federal District Court, Chief Judge Miller and Judge Gray. After considering Vick's affidavit, the Judges agreed to authorize agents of the FBI to conceal a recorder on Vick's person to determine from recordings of further conversations between Vick and Osborn whether Vick's charges were true. When Vick went back to Osborn's office later that same day, November 8, the recording device did not work properly, and Vick made a written statement of what occurred during that meeting. The Government lawyers reported these circumstances to Chief Judge Miller, who then authorized that

the recorder be used again on November 11, under stringent instructions (duplicating the original instructions on the first occasion when Judges Miller and Gray had authorized the use of the recorder) that "the tape recorder should be used under proper surveillance, supervision, to see that it was not faked in any way, and to take every precaution to determine that it was used in a fair manner, so that we could get at the bottom of it and determine what the truth was" (385 U.S. at 329, fn. 6). Chief Judge Miller also stated, in explaining why he and Judge Gray had approved the use of the recorder, that, "The affidavit contained information which reflected seriously upon a member of the bar of this court, who had practiced in my court ever since I had been on the bench. I decided that some action had to be taken to determine whether this information was correct or whether it was false. It was the most serious problem that I have had to deal with since I have been on the bench. I could not sweep it under the rug" (385 U.S. at 329-330). Vick then went ahead and obtained the recording of a conversation of November 11, which indubitably inculpated Osborn.

In the *Osborn* decision, where the Justices who had concurred or dissented in *Lopez* v. *United States*, 373 U.S. 427 (except Mr. Justice Douglas who dissented in *Osborn*, and Mr. Justice Goldberg who had meanwhile resigned from this Court) joined, the Court, after describing the facts substantially as we have above set them forth, stated as follows (385 U.S. at 329-331) (Court's footnotes omitted):

> "The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement,' but the permissibility of using such a device under the most precise and discriminate circumstances, circumstances which fully met the 're-

quirement of particularity' which the dissenting opinion in Lopez found necessary.

* * * * *

So it was that, in response to a detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice in the federal court, the judges of that court jointly authorized the use of a recording device for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegations. As the district judges recognized, it was imperative to determine whether the integrity of their court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previous good repute. There could hardly be a clearer example of 'the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment' as 'a precondition of lawful electronic surveillance.' "

Thus the Court in *Osborn* was apparently able to obtain a consensus which included some of the divergent Justices in the *Lopez* case.

The circumstances in *Osborn*—bearing no remote resemblance to the circumstances of our case—included the following:—The situation to which the proposed electronic search was addressed in Osborn was in the highest degree a specific and particularized situation, both as regards the specificity of the criminal charge and the altogether practical feasibility of confining the electronic search to words or conversation which in all likelihood were going

to relate exclusively to that specific criminal charge. Everything pointed to the fact that Vick was going to be meeting with Osborn on November 8, and then on November 11, specifically and solely for the purpose of carrying forward the specifically charged criminal project of bribing a juror in the *Hoffa* case. *Osborn* was in no sense, then, a situation in which the proposed electronic search for which advance judicial permission was sought, was going to partake of a "general search".

Furthermore, there existed in the *Osborn* case a situation of authentic exigency, an arguably overriding need—" * * * It was imperative to determine whether the integrity of their Court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth—one an informer, the other a lawyer of previously good repute" (385 U.S. at 330). This last puts a case for electronic search with advance judicial permission which is a far cry from the justification sought to be made in the present case.

Finally, contrast *Osborn* with our case as regards the egregiously slack, conclusory and probatively weak and unconvincing "factual showing" made before the "magistrate" in our case on the application for the electronic search "warrant", as contrasted with the meticulous and all but perfectionistically specific showing made to the District Judges in the *Osborn* case.

If the Court should conclude that the *Katz* and *Osborn* standards apply, there is no doubt that the wiretap evidence herein must be suppressed—even without the Court's applying the *Berger* ruling that §813-a is unconstitutional

on its face. The present wiretap fails of constitutional acceptability for several reasons—insufficient factual showing in the application, i.e., the unreliability of the informers, the attenuation of the hearsay used in the wiretap affidavits, the staleness of the alleged inculpatory information and, in short, the failure of the affidavits to establish "reasonable cause" or "probable cause"; non-exigency; excessive duration; absence of restriction to insure only discriminate evasedropping within the minimum limits of necessity; failure to particularize either the conversation to be overheard or the person; dubious need for the eavesdropping in point of the nature of the alleged crime involved, as posing no particular overriding public or private-safety need to resort to electronic spying. The ex parte Court order, and the execution of the permitted wiretapping, were grossly aggrieving under even minimal "search and seizure" tests as to scope and duration of the "search".

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

IV

[Question Presented No. 9]

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far

below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz,* 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States,* 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States,* 361 U.S. 98; *Jones* v. *United States,* 362 U.S. 257; *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171).

Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the inference from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States*, 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia*, that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra*, have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States*, 303 F. 2d 747, 751 (C.A. 1 1962), " • • • the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario*, 9 N.Y. 2d 286; *People* v. *Agron*, 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized in an illegal search has been destroyed—*Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People

which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g., Brady v. Maryland,* 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded

notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in petitioner's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (suddenly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

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* The date of the search.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or

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* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the petitioner's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

The Extraordinary Conduct of the Police in Extracting Alleged Admissions from the Complainant Esther Richards

In point of sheer luridness in the "total atmosphere of the case;" if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted,* and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest

* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States*, 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admission was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle

"that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorable an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

Further Remarks As to the Relationship Between The Wiretap and The Search

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi

found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputedly based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the arrest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained?

These peculiarities in the structure of the Appellate rulings below require at the very least—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
Attorneys for Petitioner
Carl I. Cohen

ABRAHAM GLASSER
Of Counsel

[Appendices follow]

[See also separately printed Supplemental Appendix]

APPENDIX A

Decision of New York Court of Appeals After Reargument (April 18, 1968)

STATE OF NEW YORK
IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighteenth day of April, A.D. 1968.

Present:

HON. STANLEY H. FULD,

Chief Judge, Presiding.

No. 223

THE PEOPLE &C.,

Respondent,

vs.

CARL I. COHEN,

Appellant.

This cause having been reargued before the Court of Appeals on April 8, 1968, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED AND ADJUDGED, upon reargument, that the original decision of this Court dated July 7, 1966 be and the same hereby is adhered to. No opinion. All concur except Fuld,

Appendix A—Decision of New York Court of Appeals After Reargument (April 18, 1968)

Ch. J., who dissents and votes to reverse in the following memorandum: Until the United States Supreme Court has definitively passed on the question here presented, I adhere to the views which I expressed in my dissenting memorandum on the appeal proper herein (18 NY 2d 650) and in my dissenting opinion in *People* v. *Kaiser* (21 NY 2d 86, 104).

A Copy

[Seal]

Raymond J. Cannon

Clerk

APPENDIX AA

Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON,

Clerk.

Remittitur July 7, 1966

No. 223

THE PEOPLE &C.,

Respondent,

vs.

CARL I. COHEN,

Appellant.

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and sixty-six, Carl I. Cohen, the appellant—in this cause, came here unto

the Court of Appeals, by Kleinman, Gold & Landsman, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued and reargued by Mr. Eugene Gold, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed. *And upon reargument the said Court of Appeals did further order and adjudge that the original decision of July 7, 1966, be adhered to.**

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, as aforesaid.

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* Italics added by counsel for petitioner Cohen in the within petition for certiorari (italicized portion refers to decision of April 18, 1968, Appendix A hereto, p. 1a, *supra*).

Appendix AA—Remittitur of New York Court of Appeals

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON

Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, JULY 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON

Clerk

APPENDIX B

"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. CARL I. COHEN, Appellant.

Argued June 2, 1966; decided July 7, 1966.

Crimes—wiretapping—Supreme Court vacated and set aside order authorizing telephone wiretapping of defendant's office telephone, restrained use at defendant's trial of any conversations obtained as result of wiretapping pursuant to said order and any leads, clues and information obtained as result of use of said wiretapping, restrained use at trial of any articles of evidence seized or examined in search of defendant's home and office and any leads, clues and information obtained as result of use of said articles, and also restrained use at trial of testimony of female persons named in specified indictments—Appellate Division modified, agreeing that evidence seized in search had been properly suppressed, but finding that order authorizing wiretapping had been based on sufficient affidavits —order of Appellate Division affirmed.

People v. *Cohen*, 24 A D 2d 900, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered November 29, 1965, which modified and, as modified, affirmed an order of the Supreme Court (DOMINIC S. RINALDI, J.;

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

opinion 42 Misc 2d 403), entered in Kings County, which, upon motion by defendant, (1) vacated and set aside an ex parte order issued on July 28, 1960 by a Supreme Court Justice authorizing telephone wiretapping of defendant's office telephone, (2) restrained and precluded the District Attorney of Kings County and all police officers of the City of New York from using upon defendant's trial (a) any and all articles of evidence seized or examined by police officers in defendant's home and office on September 2 and 3, 1960 and any and all leads and clues revealed or any information directly or indirectly obtained as a result of the use of said articles of evidence, (b) any and all telephone conversations obtained as a result of telephone wiretapping of defendant's office telephone pursuant to the ex parte order of July 28, 1960 and any and all leads and clues and any information obtained as a result of the use of said wiretapping and (c) the testimony of the female persons named in five specified indictments, and (3) directed the return to defendant of all the property seized from his person and office on September 2 and 3, 1960 and any and all photographs, copies, notes or memoranda of the articles seized or examined. The modification consisted of deleting the paragraphs which vacated and set aside the ex parte order of July 28, 1960 and which restrained and precluded from use upon defendant's trial the telephone conversations and the leads, clues and information obtained as a result of the wiretapping pursuant to said order and the testi-

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

mony of the female persons named in the specified indictments. The Appellate Division found that the denial of a prior motion by defendant to vacate the ex parte order of July 28, 1960 (see 41 Misc 2d 158) had not been on the merits and, accordingly, did not bar the present litigation; that the affidavits in support of the People's motion for the order authorizing the wiretapping (see 42 Misc 2d 403, 406) were sufficient, but that the search had been conducted without defendant's consent and without a warrant and had not been incidental to a lawful arrest and that, accordingly, evidence seized during it had properly been suppressed. In the Court of Appeals defendant argued, in part, that the affidavits upon which the order authorizing the wiretapping was issued were insufficient and failed to show "reasonable ground to believe that evidence of crime" might be obtained, as required by section 813-a of the Code of Criminal Procedure; that said section was unconstitutional as applied to the present case; that all evidence obtained or derived directly or indirectly from the wiretapping should be excluded as violative of Federal constitutional and statutory prohibitions, and that the wiretapping was inextricably interwoven with the unconstitutional search of September 2-3, 1960.

Eugene Gold for appellant.

Aaron E. Koota, District Attorney (*William I. Siegel* of counsel), for respondent.

Order affirmed; no opinion.

Appendix B—"Memorandum" Report of Decision (July 7, 1966) of New York Court of Appeals (Including Dissenting Opinion of Chief Judge Desmond and Judge Fuld), 18 N.Y. 2d 650

Concur: Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and KEATING. Judge FULD dissents in the following memorandum in which Chief Judge DESMOND concurs: I adhere to the views I expressed in *People* v. *Dinan* (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Communications Act, and, accordingly, vote to reverse and to order a new trial.

APPENDIX C

Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

In a criminal action, the People appeal from an order of the Supreme Court, Kings County, entered March 13, 1964 after a hearing, which (a) granted defendant's motion to suppress certain evidence allegedly obtained as the result of an unlawful search and seizure and as a result of telephone wire-tapping of the defendant's office telephone pursuant to an *ex parte* order of said court, issued July 28, 1960; (b) vacated said *ex parte* order; and (c) precluded the use at trial of any evidence or leads resulting therefrom. The People have filed the statement required by statute (Code Crim. Pro., § 518-a) in order to perfect the appeal from the said order.

Order modified (1) by amending the first decretal paragraph to provide that defendant's motion be granted only to the extent set forth in the third and sixth decretal paragraphs (as hereafter indicated) and (2) by deleting therefrom the second, fourth and fifth decretal paragraphs. Order, as so modified, affirmed.

The defendant, a physician, was charged in five indictments with nine counts alleging the commission of criminal abortions and with one count charging the crime of attempted abortion. His motion to suppress the fruits of a search of his office and to preclude the use of leads obtained through the use of a wiretap on his office telephone was granted (42 Misc 2d 403) after his prior motion to vacate and set aside the original *ex parte* wiretap order had been denied (41 Misc 2d 158).

Appendix C—Opinion of Appellate Division, Second Department, Supreme Court of New York, 24 A.D. 2d 900

The denial of defendant's motion to vacate and set aside the original order authorizing the wiretap did not reach the question of the validity of said order. The motion was denied on a finding that the moving papers in support of the motion to vacate were insufficient. Since the merits of the order were not reached, the ultimate holding does not bar a relitigation of the matters not specifically passed upon (Eagle Lion Studios v. Loews, 248 F. 2d 438, 444, affd. 358 U.S. 100; Southern Pac. R. Co. v. United States, 168 U.S. 1; St. Joseph Union Depot Co. v. Chicago R.I. & P. Ry. Co., 89 Fed. 648; cert. den. 172 U.S. 649; Schneider v. Schneider, 281 App. Div. 250).

The original wiretap order was a proper subject of judicial review in the same manner and to the limited extent permitted with respect to a warrant for search and seizure.

We hold that the affidavits in support of the People's motion for an order authorizing a wiretap were insufficient.

The finding that defendant did not consent to a search of his office is supported by the evidence. Since there was no warrant and the search was not conducted incidental to a lawful arrest, the evidence seized was properly suppressed.

BELDOCK, *P.J.*, CHRIST, HILL, RABIN and BENJAMIN, *JJ.*, concur.

APPENDIX D

Opinion of Justice Rinaldi, Supreme Court of New York, Kings County, 42 Misc. 2d 403

People, & C. v. Carl I. Cohen—The defendant is a physician who is charged with abortion under indictments returned in November, 1960. He now moves under Code of Criminal Procedure, sections 813-c, et seq., to suppress evidence obtained by telephone wiretapping and by a search of his private office. The defendant's private office telephone was tapped by police officers from July 29 to September 2, 1960, pursuant to an ex parte order issued on July 28, 1960. It is conceded by the People that the information obtained from such wiretaps resulted in the leads which culminated in the defendant's arrest for abortion at his home on the night of September 2-3, 1960. At that time, a search was also made at his home and office. The arrest and search was made without a warrant.

This court conducted an extensive evidentiary hearing on the motion to suppress. There was made available to the court, in camera, the affidavits which were presented in support of the application for the ex parte wiretap order, as well as other information.

There can be no serious dispute that pertinent New York statutes contemplate and authorize a review of wiretap orders. Code of Criminal Procedure, section 813-a, authorizing ex parte wiretap orders, itself contemplates, by its incorporation of the constitutional standard "reasonable ground" (which is equivalent to "probable cause"), and by requiring preservation of the papers, that the matter shall be subject to judicial review when necessary. Code of Criminal Procedure secs. 813-c et seq., re motions

to suppress evidence, must be read in the light of the virtually identical Federal motion procedure after which it is obviously patterned. That Federal procedure, it is settled, includes motions to suppress wiretap evidence. New York's new motion procedure (secs. 813-c et seq.) was adopted with the expressly declared legislative purpose of bringing this state into compliance with Federal constitutional search-and-seizure requirements under the Mapp case (367 U. S. 643).

CPLR, section 4506 (formerly C. P. A. sec. 345[a]), also adopted in an express effort by the legislature to meet Federal standards, make inadmissible in criminal prosecutions evidence and evidentiary leads obtained by illegal wiretapping. Therefore, when, as here, a defendant in a criminal prosecution invokes the new motion to suppress procedure in aid of his rights under the new CPLR section 4506, it is impossible to see how the court can avoid the duty of determining whether a claimedly legal telephone wiretap, assertedly authorized under this State's permissive ex parte wiretap legislation above cited, was in fact legally authorized or not under the statutory standards of said permissive procedure. The court is aware of the contention of the People that a prior proceeding which was commenced before Mr. Justice Arkwright who denied the motion to vacate the wiretap order is now a bar to the instant motion (People v. Cohen, 41 Misc. 2d 158). The court finds that such proceeding does not affect its right to pass upon the validity of the wiretap order. Such prior proceeding did not avail itself of the process of the Code of Criminal Procedure, section 813-c et seq. and in any event

never reached the merits of the issue as to the validity of such order. Mr. Justice Arkwright in his opinion denying the application before him clearly stated, and this court is in complete agreement, that our courts have the inherent power to reconsider the issuance of a wiretap order if perjury or error be shown in the original supporting affidavits or for any other cogent reason. Since the defendant at that time could only furnish limited information to him, his denial was solely on procedural grounds. The appeal from his order was dismissed by the Appellate Division, Second Department (N. Y. L. J., April 18, 1963, p. 16), and leave to appeal to the Court of Appeals was denied on July 10, 1963, by Fuld, J., and the court en banc (13 N. Y. 2d 595).

That being the case, this court deems itself under a duty to consider the issues raised by this motion on the merits. In order to do so, it must determine whether the "reasonable ground" requirement of the Code of Criminal Procedure, section 813-a, was satisfied in the issuance of the wiretap order.

The order was issued on July 28, 1960, by a former justice of this court on the supporting affidavits of Kenneth J. McCabe, chief assistant of the district attorney, now deceased, Alvin G. Rosen and his "girl friend" Audrey Salzman. These two persons were the subject of an investigation by the district attorney in crimes involving forgery, burglary and arson, none of which concerned the defendant in this case, in which it was claimed they had participated. During the course of such investigation, Rosen, in an ob-

vious attempt to curry favor with the police, volunteered information that the defendant was conducting an "Abortion Mill." The information which he furnished to the police and which was incorporated into the supporting affidavits was as follows: That Rosen and his "girl friend" had at one time visited the defendant to arrange for her abortion; that they could not agree on price; that they left and did not return because she later discovered that she was not pregnant; that a friend of the "girl friend" had once been aborted by the doctor in July or August of 1958 and subsequently again a year later and also in October or November of 1959. Rosen stated and it was so set forth in the supporting affidavits that he had obtained this information from his "girl friend" who in turn had learned of this from her friend. No supporting affidavit was obtained from the "prolific" friend. Thus supporting affidavits based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto, became the basis for the issuance of the wiretap order. There is also a serious question as to whether or not the police had previous sufficient other dealings with the informer which would have led them to depend upon the reliability of their information. In any event, the police testified that they proceeded to "tap" the office telephone of the defendant and as leads were obtained, they questioned certain females who were observed leaving his office and obtained statements from them which led to the eventual arrest and indictment of this defendant.

In the light of the foregoing, was there "reasonable ground" to believe that "evidence of crime may thus be

obtained'' in order to comply with the statutory requirement under section 813-a?

It is elementary that there can exist no ''probable cause'' to search for mere ''future'' crimes and case law as to ''probable cause'' is concerned with ''past'' or ''present'' crimes (Brinegar v. United States, 338 U. S. 160). At the most therefore, wiretapping may only be permitted upon a showing which meets the tests of ''probable cause'' that a crime has been or is being committed. Under our law as it is presently constituted, law enforcement officers are on the horns of a dilemma. Wiretapping is a crime under federal statutes but is permissible in our state if made with the sanction of a court order. And yet, if such sanction is obtained and ''taps'' made, the question presents itself whether those officers connected with such wiretapping may not be prosecuted for the violation of a federal statute. Wiretap orders are therefore issued with great reluctance and it has become the common practice to avoid issuance if other means are available to law enforcement agencies to obtain the required results.

The reliability of the informers in order for the issuing court to determine for itself ''reasonable grounds'' or ''probable cause'' becomes of paramount importance. If the police vouch for such reliability facts must be stated and brought to the attention of the court to satisfy it that such is the case. The informers, Alvin Rosen and Audrey Salzman at the time they gave information to the police concerning this defendant were themselves deeply enmeshed in what was apparently a major ring of burglars, arsonists and forgers. It is true that they ''accurately'' confessed

their own misdeeds and those of their accomplices in which they had already been implicated. They, at no time, however, previously informed the police as to crimes in which they themselves were not implicated. On that basis, the police had no criteria to judge their reliability concerning information as to this defendant. Vouching as to their reliability had no basis in fact, " * * * the affiant must * * * demonstrate that the informant has established a reputation for reliability so as to be worthy of belief" (*United States* v. *Ramirez*, 279 F. 2d 712, 715, C. A. 2, 1960).

Judge Sobel of this court, in his recent Law Journal articles (October 29, 1963) referred to "the rather strict standards of reliability of informers" citing the leading cases of *Draper* v. *United States* (358 U.S. 307), *Jones* v. *United States* (362 U. S. 257), *Henry* v. *United States* (361 U. S. 98). One of our leading cases, *People* v. *Coffey* (12 N. Y. 2d 443), along the same lines specifies that "simple, untested rumor is not ground enough nor * * * is untested information from a person of no established reliability, or suspicion alone. Substantiation of information can come either from the the informer's own character and reputation or from the separate objective checking of the tale he tells." Although these decisions and a multitude of others in the same vein, involved search and seizure, the same standards, at the least, must be applied to wiretap orders. Both types of order are obtained ex parte. However, execution of the search warrant necessarily reveals its issuance and objectives. The same may not be said of wiretap orders which are carried out surreptitiously except in those rare in-

stances where the object of the wiretap learns of it through accident. It would not be amiss for the court to state that, if at all, the standards to test the advisability of issuing a wiretap order should be much more stringent than those applied to search warrants.

The court cannot find anything in the original wiretap affidavits which meet the foregoing tests as to statutory requirements of "reasonable grounds" and "reputation for reliability." It must therefore conclude that the wiretap order was issued contrary to statutory and settled law and the said order is hereby vacated.

The wiretapping activity from July 29 to September 2, 1962, being thus determined to have been illegal in toto, all evidence and all evidentiary leads obtained or derived from the wiretap, and all evidence obtained or derived from such leads, are hereby ordered suppressed and inadmissible pursuant to CPLR, section 4506. In order that there be no doubt as to this, the court finds, from the testimony at the hearing herein, and from the reasonable inferences based on the aforesaid, that the People obtained from the wiretaps, in the case of each of the females, whose alleged abortions are the subject of the indictments, the original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based.

The court finds further, and in conjunction with the findings above stated, that the People's claim that the original information or leads referred to in said above findings were obtained from surveillance or other police activity not inclusive of wiretapping, is not supported by any evidence

other than purely conclusory assertions of the police witnesses. The latter witnesses not having testified concerning any details or concrete circumstances whatever to support such conclusory claims of surveillance results, &c., and the evidence that the original information or leads came from wiretapping being strong and convincing, this conclusory contention of the People is hereby found not to have been established.

The court further finds that the list of names of females which Policewoman O'Meara brought with her to the defendant's office on the night of September 2-3, 1960, for the purpose of checking said list against defendant's private office records, consisted either of names obtained exclusively in the first instance from the wiretaps, or of names obtained by means so inextricably connected with the wiretaps as to be required to be deemed a product thereof as a matter of law and for the purposes of the instant proceeding. The only inference permitted by the testimony and by the other records of this proceeding is that the aforesaid list of names was in itself in fact either a sole product of the wiretap, or a joint product of the wiretap plus the defendant's office records (especially the lost diary or desk calendar as to which see further infra); or was the sole produce of said office records, and that said list to the extent that it was the product of said office records was made up during or after the search of the night of September 2-3, 1960, rather than being in existence prior thereto as claimed by the People.

The People admit, and the court finds that during the search of September 2-3, 1960, the People seized a diary

or desk calendar from the defendant's private office, and that said diary or calendar subsequently disappeared while in the custody of the People.

The People also admit, and the court finds that during the search of the night of September 2-3, 1960, the People made a detailed examination of the file of patients' index cards in the defendant's private office, and that the police took written notes thereof. In this connection the court further finds that the People have not produced such written notes in their entirety at the within hearing.

The People have not produced in this hearing any written notes or memoranda as to the contents of the lost diary or desk calendar. In the overall circumstances of this case, the conclusory assertions of the police witnesses that no information relevant to the issues of this proceeding was obtained by the People from the lost diary or desk calendar, cannot be taken probatively into account in the findings herein.

From the aforesaid findings it is concluded that the People obtain [sic] either from the wiretaps or from the search of September 2-3, 1960, or from both of these in combination, their original information or leads upon which subsequent charges of abortion, or upon which subsequent investigation in turn leading to charges of abortion, were based in the case of each of said females.

In as much as the arrest of the doctor was unlawful in that it was the fruit of wiretap activity now found by the court to have been illegal, the subsequent search of defendant's office immediately following his "arrest" was likewise

unlawful. The People claim that the search was justified because the defendant invited them to do so and consented thereto. There is a presumption against consent or waiver of a defendant's constitutional right to be free from unreasonable search and seizure and the People have the burden of affirmatively establishing free and voluntary consent (Johnson v. Zerbst, 304 U.S. 458; Pekar v. United States, 315 F. 2d 319; United States v. Smith, 308 2d 657, 663). The court finds that the People have failed to overcome this presumption and that the testimony concerning this phase of the proceedings, if anything, negates any such consent or waiver.

In view of the findings of the court, there is no need to make comment or evaluate the other points set forth in the briefs submitted by counsel for the defendant.

The motion is granted in all respects. Settle order.

APPENDIX E

Statutes Involved

1. 47 U.S.C. §605

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning

of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

2. N.Y. Code Crim. Proc. §518-a

§ 518-a. Appeal from order granting motion for return of property or suppression of evidence, confession or admission; how taken

In taking an appeal from an order granting a motion for the return of property or suppression of evidence or for the suppression of a confession or admission pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, or of the confession or admission ordered to be suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

The taking of such an appeal and the filing of such a statement shall constitute a bar to (1) the filing of any criminal charge against the moving party involving the property in question, and (2) the prosecution of any existing criminal charge against the moving party involving the property, confession or admission in question, unless and until the order of return or suppression is reversed on appeal and vacated. Added L. 1962, c. 954, § 3; amended L. 1965, c. 846, § 3, eff. July 16, 1965.

3. N.Y. Code Crim. Proc. §813-a

§813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be

effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

4. N.Y. Code Crim. Proc. §§813-c to 813-e

§813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined,

except that, in the case of misdemeanors and offenses; the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, §1; L.1964, c. 490, eff. July 1, 1964.

§813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense

has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, §1, April 29, 1962.